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No. 10-476

In the Supreme Court of the United States

VARSHA MAHENDER SABHNANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Throughout the five months between petitioner's arrest and trial, the local media reported on this sensational case relentlessly, describing petitioner as a "slaveholder" who had committed "monstrous" acts of "torture." See Pet. 3-11 & n.1. In affirming the district court's denial of petitioner's venue-change motion, the court of appeals rejected a presumption of jury prejudice with the conclusory statement that "the character of the publicity" did not "warrant[] the conclusion that a presumption or inference of generalized prejudice was appropriate." Pet. App. 24a. The court of appeals failed to consider the factors that, as this Court has since made clear in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), are relevant in determining whether prejudice should be presumed, including whether the pre-trial publicity is "vivid" and "unforgettable," *id.* at 2916. Those factors compel a presumption of prejudice in this case.

The government's principal defense of the decision below is that the court of appeals "applied the appropriate standard" and "rejected petitioner's claim for reasons quite similar to those this Court gave in rejecting Skilling's claim." Br. in Opp. 12, 17. But even the most casual comparison of the two decisions conclusively refutes those assertions. Nor does the government offer any other persuasive reason why the Court should not grant certiorari and either set the case for plenary review or, at the very least, vacate the judgment below and remand for further consideration in light of *Skilling*.

A. The Court Should Grant Certiorari To Decide Whether A Presumption Of Prejudice Arises When Pervasive Pre-Trial Publicity Is Vivid And Unforgettable, The Trial Swiftly Follows The Arrest, And The Defendant Is Found Guilty On All Counts.

As the petition explains (at 18-19), *Skilling* makes clear that adverse pre-trial publicity creates a presumption of jury prejudice when some combination of the following circumstances are present: the news reports included "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; the defendant's "trial swiftly followed a widely reported crime"; there was no "large, diverse pool of potential jurors"; and "the jury's verdict did not undermine in any way the supposition of juror bias." *Skilling*, 130 S. Ct. at 2915-2916. As the petition also explains (at 19-24), these circumstances were absent in *Skilling* but—with one partial exception—are present here, and the court of appeals failed to take account of them. Finally, the petition explains (at 24-25) that a presumption of prejudice is especially warranted because petitioner invoked Federal Rule of Criminal Procedure 21(a), a more favorable standard than the Due Process standard the Court applied in prior cases. The government takes issue with each of these points, but its arguments are insubstantial.

1. The government first argues that "*Skilling* did not 'clarif[y]' the circumstances in which a presumption of prejudice applies." Br. in Opp. 11 (quoting Pet. 17). But that is exactly what *Skilling* did. The Court did not merely "conclude[] that the facts in *Skilling* did not warrant a presumption of prejudice."

Ibid. It systematically catalogued, for the first time, the factors that had led the Court to presume jury prejudice in prior cases, and it then judged the facts of *Skilling* against these criteria. *Skilling*, 130 S. Ct. at 2915-2916. The government asserts that these factors do not amount to a "test" for lower courts "to apply when evaluating potential prejudice from pretrial publicity," Br. in Opp. 11, but that is precisely how lower courts have understood *Skilling*.[1]

2. Tacitly rebutting its own assertion that *Skilling* did not clarify the factors that bear upon presumed prejudice, the government goes on to analyze those very factors and to argue that they weigh against presuming prejudice here. Br. in Opp. 12-17. But its analysis is fundamentally flawed.

First, the government contends (Br. in Opp. 15-16) that the media coverage of petitioner did not contain any "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 130 S. Ct. at 2916. That contention cannot be accepted. The media reported allegations—and published gruesome photographs purporting to show—that petitioner had committed "absolutely monstrous" acts of "incompre-

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[1] See *United States* v. *Hasan*, ___ F. Supp. 2d ___, No. 2:10cr56, 2010 WL 4282015, at *37 (E.D. Va. Oct. 29, 2010) ("[I]n the *Skilling* case[,] *** the Supreme Court emphasized several factors *** in deciding if a jury venire could not be impartial."); *United States* v. *Mitchell*, ___ F. Supp. 2d ___, No. 2:08CR125DAK, 2010 WL 3222416, at *3 (D. Utah Aug. 16, 2010) ("[T]he Court [in *Skilling*] analyzed the issue by focusing on several factors relevant to a determination of presumed prejudice."); *State* v. *Hayes*, No. CR070241859, 2010 WL 3328076, at *2 (Conn. Super. Ct. July 28, 2010) ("*Skilling* identifies four relevant factors for judicial consideration").

hensible brutality and violence and inhumanity," including "modern day slavery" and "physical torture," that the police considered the "worst *** they've ever seen." Pet. 19-20. If that publicity is not "vivid, unforgettable," and "memorable," and "likely imprinted indelibly in the mind[s]" of those exposed to it, *Skilling*, 130 S. Ct. at 2916, then no publicity is.

The government endorses the court of appeals' statement that "'most of the press coverage tracked the frequent court proceedings in this case.'" Br. in Opp. 16 (quoting Pet. App. 21a). But like the court of appeals, the government fails to explain why articles portraying the Sabhnanis as a "millionaire slave couple," and petitioner's actions as "torture," are any less vivid and unforgettable simply because they happen to have been prompted by a proceeding in the case. Like the court of appeals, moreover, the government cites no authority to support this view. There *is* no support for it, either in logic or in law.

The government also says that the news coverage here "hardly rivals the volume of coverage even in *Skilling*." Br. in Opp. 16. For this factor, however, what matters is not the "volume" of coverage but its character and likely effect. And the "news stories about Enron contained nothing resembling the horrifying information rife in reports about" petitioner. *Skilling*, 130 S. Ct. at 2922.

Second, the government argues (Br. in Opp. 16) that petitioner's trial did not "swiftly follow[] a widely reported crime." *Skilling*, 130 S. Ct. at 2916. In *Skilling*, the Court concluded that this factor weighed against presuming prejudice because "over four years elapsed between Enron's bankruptcy and Skilling's trial." *Ibid.* The government says that the same conclusion is warranted in this case because

petitioner's trial commenced five months after her arrest. Br. in Opp. 16; see Pet. 20-21. But surely the five-month interval between arrest and trial here is more like the intervals of two months in *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), see Br. in Opp. 16, and three months in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), see Pet. 21, than like the more-than-48-month interval in *Skilling*. More important, unlike in *Skilling*, and contrary to the government's assertion, the "'decibel level of media attention'" did not "diminish[]" as petitioner's trial approached. Br. in Opp. 16 (quoting *Skilling*, 130 S. Ct. at 2916); see Pet. 9-11 & n.1.

Third, the government discounts (Br. in Opp. 16-17) the factor this Court found to be "of prime significance" in *Skilling*: that the jury handed the government an "overwhelming victory" by finding both petitioner and her husband guilty on all 12 counts. *Skilling*, 130 S. Ct. at 2916. According to the government, "the mere fact of conviction does not affirmatively support a presumption that the jury was prejudiced." Br. in Opp. 16 (emphasis omitted). But no one contends that a presumption of prejudice follows from the "mere" fact of conviction. It is the *combined* effect of the considerations identified in *Skilling*—the "memorable," "indelibl[e]," "vivid," and "unforgettable" nature of the pre-trial publicity, 130 S. Ct. at 2916, the trial's temporal proximity to that publicity, *and* the jury's decision to convict on every one of the 24 counts (12 for each defendant)—that compels the conclusion that jury prejudice should be presumed here.[2]

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[2] The government places heavy reliance (Br. in Opp. 11, 14) on the fact that *Estes* v. *Texas*, 381 U.S. 532 (1965), and *Sheppard*

3. The government also argues that petitioner's "reliance on Rule 21" neither "bolsters her claim of reversible error" nor "makes this case a more suitable vehicle for plenary review." Br. in Opp. 13 n.6. The government's basic position seems to be that Rule 21 is not more protective than the Due Process Clause and that, instead, the two standards are identical. If that were so, however, there would have been no reason for the Court in *Skilling* to reserve the question whether the defendant was entitled to a change of venue under Rule 21. See *Skilling*, 130 S. Ct. at 2913 n.11; see also *id.* at 2942 (Alito, J., concurring in part and concurring in the judgment); *id.* at 2953 n.9 (Sotomayor, J., concurring in part and dissenting in part). Instead, the answer to that question would necessarily have followed from the Court's holding that due process did not require a transfer. This point is made quite clearly in the petition (at 25), and the government has no response to it.

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involved both "extraordinary pretrial publicity *and* other circumstances affecting the trial itself." *Id.* at 8; see *Skilling*, 130 S. Ct. at 2914. But the Court itself placed little reliance on that fact in *Skilling*, relegating it to a brief footnote. *Skilling*, 130 S. Ct. at 2915 n.14. The government also contends (Br. in Opp. 14-15) that "the size and characteristics of the community in which the crime occurred," *Skilling*, 130 S. Ct. at 2915, weigh against a presumption of prejudice here. But the government has no answer to petitioner's argument that the absence of a "broad and diverse" jury pool (Br. in Opp. 14) cannot be a necessary condition for a presumption of prejudice, inasmuch as the *Sheppard* case was tried in a large city. See Pet. 22 n.3.

B. The Court Should Grant Certiorari To Decide Whether A Presumption Of Jury Prejudice Is Irrebuttable.

As the petition explains (at 26), because a presumption of jury prejudice is warranted here, this case presents the Court with an opportunity to decide the question it agreed but had no occasion to decide in *Skilling*: whether the government may rebut the presumption of prejudice. As the petition also explains (at 26-28), the lower courts are divided on that question, and this Court's decisions make clear that the presumption is irrebuttable. Finally, the petition explains (at 28-30) that, even if a presumption of prejudice were rebuttable, it could not be rebutted here. The government's arguments to the contrary lack merit.

First, the government contends that "an irrebuttable presumption cannot be justified under this Court's cases." Br. in Opp. 19. Remarkably, however, the government does not discuss—or even cite—a single one of the Court's decisions that actually presumed prejudice (*i.e.*, *Rideau*, *Estes*, and *Sheppard*). See *id.* at 19-20. Much less does it make any attempt to explain how the presumption of prejudice could be rebuttable when the Court reversed convictions on the basis of the presumption in each of these cases without any inquiry into whether the presumption was rebutted—or into actual prejudice more generally. See Pet. 27-28.

Equally remarkably, the government acknowledges this Court's repeated statement that a presumption of prejudice arises when pre-trial publicity is such that jurors' claims of impartiality "'should not be believed,'" Br. in Opp. 19 (quoting *Mu'Min* v. *Virginia*, 500 U.S. 415, 429 (1991), in turn quoting *Pat-*

ton v. *Yount*, 467 U.S. 1025, 1031 (1984)), but it would have the Court interpret that statement to mean "only that when pretrial publicity is particularly intense, the district court should conduct a more searching inquiry than usual," *id.* at 19-20. While words sometimes have a "range of possible meanings," *Taylor* v. *United States*, 495 U.S. 575, 590 (1990), "should not be believed" cannot possibly mean "may be believed as long as the inquiry is more searching than usual."

The government also cites *Neder* v. *United States*, 527 U.S. 1 (1999), for the proposition that "a rule of 'automatic reversal' is appropriate 'only in a very limited class of cases.'" Br. in Opp. 20 (quoting 527 U.S. at 8). But as the petition points out (at 28), this Court has made clear that that class of cases *includes* those involving presumed prejudice from pretrial publicity. See *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986).

Second, the government argues that "petitioner cannot establish a circuit conflict warranting plenary review on th[e] issue" of whether a presumption of prejudice is rebuttable. Br. in Opp. 21. It points out that some of the cases the petition cites for the proposition that the presumption is not rebuttable "rejected the pretrial-publicity claim[] and denied relief." *Id.* at 20. But those cases rejected the claim, not because they concluded that a presumption of prejudice was rebutted, but because, as the government concedes, they determined that "no presumption at all" was warranted in the particular circumstances of the case. *Ibid.* And in describing the presumption of prejudice, the cases made clear that, when the presumption does arise, it is not subject to rebuttal. See Pet. 27 nn.6-7. The government sug-

gests no reason why future panels in the relevant circuits would not deem themselves bound by these "explications of the governing rules of law." *Allegheny Cnty.* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (opinion of Kennedy, J.).

In the end, the arguments the government makes against the existence of a circuit conflict are essentially identical to those it made in opposing certiorari in *Skilling*, see Brief in Opposition at 19-22, *Skilling* v. *United States*, 130 S. Ct. 2896 (2010) (No. 08-1394), *available at* 2009 WL 2481332, and yet this Court granted review in that case to decide whether the presumption of prejudice can be rebutted, see Pet. 26. Indeed, the division in the lower courts on that issue was doubtless one of the reasons for the grant of certiorari.

Third, the government claims that this case does not "present[] a plausible vehicle to address the question" whether the presumption of prejudice is rebuttable, because the court of appeals did not decide the issue (having concluded that no presumption arose). Br. in Opp. 18. But whether the presumption of prejudice can be rebutted is not presented as a stand-alone question in this case. The petition asks the Court to decide whether the presumption arises here, "and, if so, whether a presumption of jury prejudice is irrebuttable." Pet. i.

If the Court granted review and agreed with the court of appeals that prejudice should not be presumed, it obviously would have no occasion to decide whether the presumption could be rebutted. That is what happened in *Skilling*. But if the Court decided that prejudice *should* be presumed, there is no reason why it could not then decide whether the presumption is subject to rebuttal. That is a pure ques-

tion of law, and closely bound up with the question whether a presumption arises in the first place. If the Court decided that the presumption was irrebuttable, that would be the end of the case. If it decided otherwise, the Court could either examine the record to determine whether the presumption was rebutted or remand to allow the lower courts to decide that issue in the first instance.

C. At The Very Least, The Court Should Grant The Petition, Vacate The Judgment Below, And Remand For Further Consideration In Light Of *Skilling*.

As the petition explains (at 30-32), if the Court does not grant plenary review, it should grant certiorari, vacate the judgment below, and remand the case (GVR) for further consideration in light of *Skilling*. The government contends that a GVR order is not warranted because "the court of appeals rejected petitioner's claim for reasons quite similar to those this Court gave in rejecting Skilling's claim." Br. in Opp. 17. But that is simply not correct.

Skilling was the first decision of this Court to systematically describe the factors that are relevant in determining whether pre-trial publicity gives rise to a presumption of jury prejudice. Because *Skilling* postdated the court of appeals' decision in this case, that court rendered its decision without the benefit of the factors *Skilling* identified. The court of appeals did not apply these factors. Nor did it apply "similar" factors. Indeed, as far as the issue of presumed prejudice is concerned, the court of appeals did not apply *any* factors. See Pet. 22, 30. It simply stated that "[c]ases presenting this scenario are very rare" and that "the character of the publicity" in this case did not warrant the presumption. Pet. App.

22a, 24a. That was the sum and substance of its analysis.

The government is therefore mistaken in its assertion that the court of appeals "applied the appropriate standard." Br. in Opp. 12. And this is thus precisely the sort of case in which a GVR order—at the very least—is warranted. Such an order would guarantee petitioner "full and fair consideration of h[er] rights in light of all pertinent considerations" while "respect[ing] the dignity of the Court of Appeals by enabling it to consider *** [a] relevant decision[] *** that w[as] not previously before it." *Stutson* v. *United States*, 516 U.S. 193, 197 (1996) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Skilling* v. *United States*, 130 S. Ct. 2896 (2010).

Respectfully submitted.

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